IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1091 of 2004
with
CRIMINAL MISC.APPLICATION No 6057 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DINESHBHAI RAMANBHAI PANCHAL
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 1091 of 2004
MR JM PANCHAL for Appellant
MR ND GOHIL, APP for Respondent No. 1
2. Criminal Misc.Application No. 6057 of 2004
MR JM PANCHAL for Applicant
MR ND GOHIL, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 07/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

While hearing the bail application filed under Sec.389 of the Code of Criminal Procedure (for short, 'the Code'), it appeared to us the finding recorded by the trial Court holding the appellant guilty of committing offence under Sec.376 of the Indian Penal Code was not proper. We have, therefore, with the consent of Mr.J.M.Panchal, learned Advocate for the appellant as well as Mr.N.D.Gohil, learned APP, taken up the appeal itself for final disposal.

2. The appellant was tried in the Court of learned Addl.Sessions Judge, Ahmedabad in Sessions Case No.68 of 2004 for the alleged commission of the offence punishable under Sec.376 of the Indian Penal Code (for short, 'IPC'). It was alleged against him that on the day of incident, i.e. on 14th July 2003, the victim child Umangi, aged about six years and her mother, Nainaben, PW2 were present in the house. When Umangi came out of the house, the appellant took her to his house saying that he would play with her. It was around 9.30 a.m. Shortly thereafter Umangi returned to her mother crying. When her mother asked her why she was crying, she complained to her that her private part was severely paining. Nainaben, therefore, took out her nicker and found injuries on the private part and it had got swelling on it and it had also become reddish. Since Nainaben questioned her about the cause, she informed that it was the appellant who took her to his house. He thereafter inserted his penis into her private part. Nainaben, however, waited for return of her husband and when he returned from service, she told him about the incident. They thereafter took Umangi to a private Doctor, who is also examined at the trial namely, Dr.K.C.Kanjani - PW1. He examined the girl but he did not find any external injury on her private part. He, however, advised them to go to the Civil Hospital, Ahmedabad because this happened to be a medico legal case. Thereafter, the girl was taken to the Civil Hospital on the next day where she was examined by Dr.Bhavnaben I.Patel, PW7. She also did not find any marks of external injury nor did she notice any internal damage to the private part of the victim. However, the police, upon receipt of the complaint, commenced the investigation and on completion of the same, submitted the chargesheet in the Court of the Metropolitan Magistrate, Ahmedabad, who in turn, committed the case to the Court of Sessions, Ahmedabad for the offence

punishable under Sec.376 of IPC is exclusively triable by the Court of Sessions.

At the trial, the appellant pleaded not guilty of the charge and claimed to be tried. The prosecution examined eight witnesses as well as produced documentary evidence in support of the case. After completion of the recording of the evidence, the learned trial Judge recorded the further statement under Sec.313 of the Cr.PC. It appears that he has not pleaded any specific defence, but it is that of general denial.

At the end of the trial, the learned Judge convicted the appellant for the offence under Sec.376 of IPC and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- in default, to undergo further rigorous imprisonment for one year. The said order of conviction and sentence is challenged in this appeal.

3. We have perused the record of the case and in particular the compilation submitted by Mr.J.M.Panchal, learned Advocate for the appellant, containing the oral evidence as well as the relevant documentary evidence. We have also perused the judgment of the trial Court and have carefully considered the submissions advanced by Mr.Panchal for the appellant as well as Mr.N.D.Gohil, learned APP for the respondent State.

Mr.Panchal has submitted that the prosecution has failed to prove the case against the appellant beyond any reasonable doubt. He has further submitted that the evidence on record and in particular the medical evidence does not substantiate the prosecution case. He has, in the alternative, submitted that, at best, the appellant could be saddled with the liability of making an attempt to commit rape and the offence can be punishable under Sec.376 read with Sec.511 of IPC. Lastly, he has submitted that the appeal deserves to be allowed and the appellant is required to be acquitted.

Mr.N.D.Gohil learned APP has, however, supported the judgment of the trial Court. He has submitted that there is cogent and reliable evidence on record to support the case of the prosecution and the prosecution witnesses have no reason to falsely implicate the appellant in a case where the reputation of the entire family is at stake. He has lastly prayed that the appeal has no merits and it may be dismissed.

4. We have carefully gone through the entire evidence with a view to re-appreciate it. The evidence of Nainaben is completely trust-worthy and cogent. It is she who has first noticed the victim immediately after she was subjected to sexual harassment. She has inquired from the child immediately after she came home crying and she was informed by her that the appellant had taken her to his residence and had inserted Penis into her private part. It may be noted here that she has described in exact manner what was said to her by child Umangi. It can be reproduced in verbatim in Gujarati as under:

(In Gujarati)

Nainaben has explained that small children call the private organ as Pipi.

This witness has been cross examined by the defence but nothing of any importance from the point of view of the defence has been elicited from her. Similarly, child Umangi has also been examined and her entire evidence has been recorded in the form of question and answer. On the aspect of the actual incident, she has also described the act in the aforesaid manner and has stated that the appellant had touched her private part with his private organ. It is also on record that after return of her father, Umangi was taken to the private Doctor and before the private Doctor also, the same history has been given. Dr.Kanjani has narrated about the same. Considering the oral testimony of all these witnesses, there is no doubt in our mind that the appellant is involved in the present incident.

5. The question that is required to decided now is whether the finding given by the trial Court that the appellant is guilty of committing offence under Sec.376 of IPC is proper. On this aspect, we have carefully considered the medical evidence on record. So far the evidence of Dr.Kanjani is concerned, it appears that within few hours of the incident, child Umangi was taken to him for examination and treatment. However, he declined to treat her because this being a medico legal case and he advised the parents to take her to the Civil Hospital. He has, of course, stated in his evidence that he had cursorily examined the patient, i.e.Umangi and he did not notice any external injury on her private part. Of course, he has not made any internal examination of the Vagina of Umangi. Thereafter, she had been taken to the Civil Hospital for medical examination. Dr.Bhavnaben

Patel has been examined. Her evidence also does not indicate any external injury nor any internal injury. Of course, in her opinion, if the patient is brought after about 12 hours, there would not be any mark of external injury and the evidence shows that Umangi was taken to her after 17 hours. She also made internal examination of victim's vagina and found that there were no external injuries. She has issued the medical certificate about the examination of the victim, which is on record at Exh.26. The appellant was subjected to the scientific test which is found to be negative. Thus, the prosecution has failed to prove that the appellant had forcibly inserted his organ into the private part of child Umangi and had completed the act. From the aforesaid medical evidence, it appears that merely an attempt had been made by the appellant to rape her. This medical evidence gets some support from the testimony of Umangi also when she says that the appellant had merely touched her private part with his organ. In this view of the matter, it is difficult to hold that the appellant had committed any offence under Sec.376 of IPC. Of course, from the overall view of the evidence adduced by the prosecution, there is no doubt in our mind that the girl was subjected to some molestation and the appellant did try to rape her. Such attempt is also made punishable by the Penal Code and in our opinion, the appellant has committed the offence punishable under Sec.376 read with Sec.511 of the IPC. Sec.511 of IPC prescribes half of the maximum sentence of the principal offence. Mr.Panchal has submitted that the Apex Court as well as different High Courts of the Country, even in the case of attempt of rape on minor girl, have awarded at the most, sentence of five years of rigorous imprisonment. In our opinion also, the ends of justice would meet if the appellant's sentence of life imprisonment is converted into a sentence of five years of rigorous imprisonment for the offence under Sec.376 read with Sec.511 of IPC.

6. In the result, the appeal is partly allowed. The order of conviction and sentence dated 21.5.2004 passed by the learned Addl.Sessions Judge, Ahmedabad, in Sessions Case No.68 of 2004 is altered to one under Sec.376 read with Sec.511 of IPC. The sentence of rigorous imprisonment for life is converted into one of rigorous imprisonment for five years. We retain the sentence of fine as it is and also the punishment prescribed in default. We also retain the direction of the trial Court with regard to payment of the same to the victim. This appeal is partly allowed to the aforesaid extent. It is needless to say that the appellant will

get the benefit of set off.

7. In view of the order passed in the main appeal, no order is required to be passed in the Criminal Misc.Application for bail and it stands disposed of accordingly. Notice is discharged.

(Kshitij R.Vyas, J.)

Sreeram. (Akshay H.Mehta, J.)